CHIAM TAU TZE & ANOR.

v.

THE SARAWAK LAND CONSOLIDATION AND REHABILITATION AUTHORITY AND ANOTHER CASE

HIGH COURT BORNEO, KUCHING
TUAN RICHARD MALANJUM J.
[ORIGINATING MOTION NO. KG. 8 OF 1993 (II) & KG. 9 OF 1993 (III)]
20 JUNE 1994

ARBITRATION: Arbitrator's award published - Arbitrator not awarding pre-trial interest - No reasons given - Whether amounted to technical misconduct - Application to remit award to Arbitrator for further consideration - Whether should be allowed - Whether there was an error on the face of the award - Whether reference to extrinsic evidence incorporated in the award permissible - Whether arbitrator's award should be set aside.

These consolidated suits were in relation to an award made and published by the Arbitrator on 28 April 1993. The applicant in O.M. No. KG. 8 of 1993 (II) was the claimant in the arbitration proceedings. The arbitrator had failed to grant pre-award interest and no reason or explanation was given for such failure. The claimant applied for an order to remit the award to the learned Arbitrator for his further consideration arguing that the course taken by the Arbitrator amounted to a technical misconduct thereby entitling the award to be remitted for further consideration.

The respondent objected to the application on the grounds that there was nothing irregular with the award. The respondent further contended that the interest element is a matter of discretion which was duly exercised by the learned Arbitrator when he awarded it only from the time the award was given and further argued that no pre-award interest should be given as it was not pleaded in the claim.

The applicant in O.M. No. KG. 9 of 1993 (III) (Salcra) was the respondent before the Arbitrator. Salcra applied for remission of the award to the Arbitrator for reconsideration of award No. 2 on the ground that the award of RM14,420 ought not to have been made as Salcra had, prior to the making of the award, paid and/or accounted for the said sum to the claimant.

Salcra also applied for the award to be set aside on the grounds that the learned Arbitrator made an error in law and/or in fact as his findings were so at variance with the evidence as to create an irrebutable presumption that bias was present. Salcra contended that such error amounted to misconduct thereby enabling the Court to interfere.

Held:

[1] On persual of the claim of the applicant in O.M. No. KG. 8 of 1993, it is clear that interest has been pleaded as item (e) in the prayers of the applicant's claim though not as specific as the learned Counsel for the respondent would want it to be. Further it was not disputed that the learned Counsel for the applicant did submit before the learned Arbitrator that interest up to the date of his award should be granted.

[2] The only conclusion to be reached on the facts of the case was that the learned Arbitrator has failed to consider this aspect of his function and such a failure constitutes a technical misconduct thereby allowing the Court to order that the award be remitted to him for further consideration on the issue of pre-award interest.

[3] With regard to O.M. No. KG. 9 of 1993, although there is no apparent error on the face of award No. 2, the principle applicable in an application to set aside an award namely that reference to extrinsic evidence is permissible if such evidence has been incorporated in the award, should be applicable where only an order for remission is applied for.

[4] On perusal of award No. 2, there is no doubt that the learned Arbitrator did make reference to the Points of Defence of Salcra, not only by way of elaboration or itemisation but, also as a basis for making award No. 2. In the circumstances, the Points of Defence should be taken as having been incorporated in award No. 2.

[5] The learned Arbitrator failed to consider paragraph 7 of the Points of Defence in making award No. 2. While paragraph 4 appears to be an admission of the sum due, such admission should have been considered together with paragraph 7. In the circumstances, the learned Arbitrator misconstrued the effect of the admission in the Points of Defence and thereby committed an error of law which justifies the remission of award No. 2 to him for reconsideration.

[6] In any event learned Counsel for the claimant did not dispute the allegation that the sum of RM14,420 has been taken into account in the retention sum. In such a situation it is not fair for Salcra to be made to pay twice for the same services rendered and in the exercise of the Court's supervisory jurisdiction award No. 2 should be remitted to the Arbitrator for reconsideration as justice cannot otherwise be done.

[7] As for the second limb of Salcra's application, to set aside the award on the grounds of misconduct by the arbitrator, the complaint is more on the findings of fact. To come to a finding of law on the issue raised, the facts have to be ascertained and the learned Arbitrator did so. Whether or not he drew the wrong inference of fact from the evidence in itself is not sufficient as a ground to warrant setting aside the award.

[8] As Salcra had failed to clearly show that there was an error on the face of the award, inclusive of reference to extrinsic evidence if it has been incorporated in the award, they were not justified to now say that the findings were erroneous. Having perused the notes of proceedings of the arbitration hearing, the Court did not have the jurisdiction to reconsider the findings of which the learned Arbitrator should be taken as the sole judge.

[9] There was no merit in the alleged breach of condition 10(b) of the main contract which was submitted in support of the second limb of the application. The evidence adduced showed conflicting versions which therefore entitled the learned Arbitrator, being the sole judge of fact, to make his own inferences or conclusions.

[10] In the circumstances, Salcra's grounds for the second limb of the application have failed to pass the test necessary before any act or finding of the learned Arbitrator can be considered as amounting to a misconduct.

[For O.M. No. KG 8 of 1993, award remitted to the Arbitrator for reconsideration on the issue of pre-award interest. For O.M. No. KG 9 of 1993, award No. 2 remitted to the Arbitrator for his reconsideration. Application to set aside award dismissed].

Cases referred to:

P. J. Van Der Zijden Wildhandel N. V. v. Tucker & Cross Ltd. [1976] Vol. 1 Lloyds's Law Report 341 at p. 343 ***(refd)***

Ong Guan Teck & Ors. v. Hijjas [1982] 1 MLJ 105 ***(refd)***

Ganda Edible Oils Sdn. Bhd. v. Transgrain B. V. [1988] 1 MLJ 428 at p. 431D ***(refd)***

Belsfield Court Construction Co. Ltd. v. Pywell [1970] 1 All ER 453 ***(refd)***

Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority [1971] 2 MLJ 210 ***(foll)***

Heaven and Kesterton Ltd. v. Sven Widaeus A/B [1958] 1 All ER 420 ***(refd)***

Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd. [1962] 2 All ER 53 ***(refd)***

Hodgkinson v. Fernie 140 ER 1712 ***(refd)***

G. K. N. Centrax Gears Ltd. v. Matbro Ltd. [1976] 2 Lloyd's Report 555 ***(refd)***

Legislation referred to:

Arbitration Act 1952, ss. 22, 23, 24

Other sources referred to:

Russel on Arbitration, 20th Edn at pp. 324, 395, 396

Halsbury's **Laws of England,** Vol. 2, 4th Edn. paragraph 617, 623

In O.M. No. KG.8 of 1993(II)

For the applicant - Lee Chuan Eng; M/s. Ee & Lim

For the respondent - Albert Tang; M/s. Chew, Jugah Wan Ullok, Goh & Co.

In O.M. No. KG.9 of 1993 (III)

For the applicant - Albert Tang; M/s. Chew, Jugah Wan Ullok, Goh & Co.

For the respondent - Lee Chuan Eng; M/s. Ee & Lim

JUDGMENT

Richard Malanjum J:

The matters that came before me were two applications of the respective parties by way of originating motions which concerned the Award of an Arbitrator appointed by the parties hereto. Both applications have been consolidated by an order of the Court made on 30 September 1993. The claimants in the hearing before the learned Arbitrator were the applicants in Originating Motion No. KG. 8 of 1993. For the sake of convenience it may be appropriate to reproduce the award *in toto* which was made and published on 28 April 1993 as follows:

1. By a contract in writing dated 21 July 1977 and made between Naga Trading Company having its place of business at No. 11, St. Paul's Drive, Kuching, Sarawak (hereinafter called the Claimant) of the one part and The Sarawak Land Consolidation And Rehabilitation Authority, a body corporate established under the Lembaga Penyatuan dan Pemulihan Tanah Sarawak (Sarawak Land Consolidation and Rehabilitation Authority) Act 1976 and having its Head Office on 8 Floor, Bangunan Yayasan Sarawak, Kuching, Sarawak (hereinafter called the respondent) of the other part the claimant agreed to execute and complete for the respondent the contract works of Land

Clearing, Construction of Agricultural Road, Construction of platforms, cutting and removal of timber along harvesting paths, etc in accordance with the specifications and plans and upon the terms and conditions in the said contract at the respective rateable sums stated therein.

2. Differences have arisen between the claimant and the respondent with reference to the construction of the said contract namely as to the cutting and removal of timber on planting points and along harvesting paths whether the claimant is entitled to payment for the entire plantable area of 5,684 acres or only for areas where the said works were actually performed and as to the transportation of 30,986 seedlings from the Nursery at Lemanak to the Batang Ai Oil Palm Scheme whether the said work is part of the said contract or an independent contract and even if the same is part of the said contract whether the rate of RM0.40 per seedling/mile appearing in item 20 of the schedule of rates for purposes of variation orders in the said contract was a clerical error or mistake.

3. One of the conditions of the said contract was that any difference or dispute that might arise between the parties as to the construction of the said contract or any matter or thing arising thereunder should be referred to arbitration and final decision of a person nominated and appointed by agreement between the parties, a dispute did arise and it was agreed between the claimant and the respondent to refer the same to me as sole arbitrator.

Now Therefore, I the said Richard Chua Geok Seng having considered the contract documents pleadings and other particulars and exhibits and having heard the evidence adduced and tendered before me in relation thereto and the submissions of counsel of both the claimant and respondent respectively that were submitted and addressed to me Here Find And Award of and concerning the matters so referred to me in manner following that is to say:

1. I award and find that in respect of the cutting and removal of timber on planting points and along harvesting paths the claimant is only entitled to payment for works actually performed and I find that such works were only performed in the jungle areas totalling 830.68 acres.
2. I award and find that it being admitted in the points of defence that out of the sum of RM33,227.20 payable a sum of RM18,807.20 only had been paid to the claimant there is justly due from the respondent to the claimant the sum of RM14,420 for the works of cutting and removal of timber on planting points and along harvesting paths.
3. I award and find that the transportation of 30,986 seedlings from Lemanak Nursery to Batang Ai Oil Palm Scheme by the claimant is part of the said contract and not an independent contract.
4. I award and find that the rate of RM0.40 per seedling/mile appearing in item 20 of the schedule of rates for purposes of variation orders in the said contract is not a clerical error or mistake.
5. I award and find that there is justly due from the respondent to the claimant the sum of RM185,916 in respect of the transportation of the said 30,986 seedlings.
6. I award and find that having regard to my findings and awards in Clauses 3 and 4 of this my award the respondent is not entitled to succeed in its Counterclaim which is accordingly rejected.
7. I award and find that the claimant is not entitled to succeed in its claim for damages.
8. I direct that the respondent pay the claimant the said sums of RM14,420 and RM185,916 **forthwith** failing which the claimant is entitled to interest on the said sums at the rate of eight per centum (8%) per annum from the date of this award until the date of full payment.
9. I award and direct that the cost of the reference and costs of the award shall be borne and paid as to one quarter by the claimant and as to three-quarters by the respondent.

OM No. KG. 8 of 1993:

I shall first deal with the first application OM No. KG. 8 of 1993. In this application the applicant is seeking for this Court to order the remission of the award to the learned Arbitrator for further consideration as there was no pre-award interest given nor was there any reason or explanation given for such refusal. Learned Counsel for the applicant submitted that the course taken by the learned Arbitrator amounted to a technical misconduct thereby entitling the award to be remitted to him for further consideration. It is to be noted that the other prayer of the applicant, namely, for damages for breach of contract, was withdrawn at the hearing.

Learned Counsel for the respondent in objecting to the application submitted that there was nothing irregular with the award. He went on to say that an interest element is a matter of discretion which was duly exercised by the learned Arbitrator when he awarded it only from the time when the award was given. The commencement date of the pre-award interest was also disputed. But in my view that is

irrelevant at this stage. Further, learned Counsel also argued that no pre-award interest should be given as it was not pleaded in the claim.

The question to be asked is this: Is it a technical misconduct on the part of the learned Arbitrator for not giving a pre-award interest to the applicant or failing to give any reason for not doing so?

Learned Counsel for the parties have no dispute on the following:

(i) that awarding interest is a discretionary matter but to be exercised judicially;
(ii) that interest was in fact awarded as from the date of award if the payment was not made forthwith; and
(iii) that it was agreed that the award was to be unreasoned award.

I deal first with the issue of whether the element of pre-award interest has been pleaded in the claim of the applicant. On perusal of the claim of the applicant it is clear that interest has been pleaded as item (e) in the prayers of the applicant though not as specific as the learned Counsel for the respondent would want it to be. But in my view item (e) is sufficient. After all 'it was always considered that he (arbitrator) had power to do so, (i.e. to award interest up to the date of his award) by virtue of his implied authority to follow the ordinary rules of law, and he not only has the power but he should normally exercise it in the absence of a cogent objection': **Russel on Arbitration** (20th Edn.) at p. 324. Further, it was not disputed that the learned Counsel for the applicant did submit before the learned Arbitrator that interest up to the date of his award should be granted.

The foregoing disposes of the issue on absence of pleading on pre-award interest.

Now, it is obvious that pre-award interest was not given nor considered by the learned Arbitrator in making his award. No reason was given as well. In fact even the post-award interest was made upon the failure of the respondent to pay forthwith the sum awarded. Hence, I can only conclude that the learned Arbitrator has failed to consider this aspect of his function and in my view such a failure constitutes a technical misconduct thereby allowing this Court to order that the award be remitted to him for further consideration on the issue pre-award interest. In coming to such a conclusion I have taken guidance from what Kerr J. said in *P.J. Van Der Zijden Wildhandel N.V. v. Tucker & Cross Ltd.* [1976] Vol. 1 Lloyd's Law Report 341 at page 343:

> Although everyone knows how very inappropriate this unfortunate word "misconduct" is, I am bound to say that in my view a failure to award any interest or to deal with interest in such circumstances constitutes technical misconduct. But even if I should be wrong about this, and if there was no technical misconduct in the sense of the arbitrator not having followed the ordinary practice and not having acted judicially in this matter, then I would still have remitted this case to the arbitrator so that he should make an appropriate award of interest. The reason is that it seems to me, as it did to the Court of Appeal in that case, to be quite wrong that in a dispute in which it has been held that one party should have been paid a sum of money some substantial time ago, which the losing and contractually liable party has had in its pocket for that period, there should nevertheless be no award of interest unless there be some exceptional jurisdiction for such a course.

Earlier on in his judgment Kerr J. also said this at page 343:

> When there is a claim for interest, and when there is sufficient information before the tribunal to award interest and no contention to the contrary, then that authority and the earlier authorities referred to in it, show that in a commercial arbitration the arbitrator should ordinarily include interest in an award for damages. In such a situation it seems to me it is incumbent upon the other side to put forward reasons, either why no interest should be awarded or why it should for some special reason be confined to a shorter period than that beginning with the appropriate commercial time for payment, or why it should be at some special rate. When nothing like that is suggested, as was the position here, then it seems to me that a tribunal is not acting judicially if it fails to deal with the question of interest.

Accordingly, I hereby grant the order prayed for by the applicant in OM No. KG. 8 of 1993 only in so far as it relates to the award of interest up to the date of the award of the learned Arbitrator.

OM No. KG. 9 of 1993:

By this originating motion the applicant, the Sarawak Land Consolidation and Rehabilitation Authority (hereinafter referred to as "Salcra") is praying firstly, for the Award No. 2 of the learned Arbitrator to be remitted to him

for reconsideration on the ground that the award of RM14,420 for the cutting and removal of timber on planting points and along harvesting paths and the direction that Salcra pays the respondents the sum of RM14,420 forthwith ought not to have been made as Salcra had, prior to the making of the award, paid and/or accounted for the said sum to the respondents.

Secondly, as a further or in the alternative, that the award should be set aside on the grounds that:

(a) the finding of fact and award that the transportation of 30,986 seedlings from Lemanak Nursery to Batang Ai Oil Palm Scheme by the respondents is part of the said contract and not an independent contract is an error of both fact and law;
(b) the findings of fact and award that the rate of RM0.40 per seedling/mile appearing in item 20 of the schedule of rates for of variation orders in the said contract is not a clerical error or mistake, is inconsistent or against the weight of evidence adduced at the Arbitration hearing.

In his submissions learned Counsel for Salcra argued that:

(i) the learned Arbitrator made an error in making the award No. 2 for the payment of RM14,420 by Salcra as he did when such sum had been merged to the retention sum which had been paid to the respondents. Accordingly such award should be remitted for the reconsideration of the learned Arbitrator;
(ii) the award should be set aside as the learned Arbitrator made an error in law and/or in fact as he did when he made his findings which were so at variance with the evidence as to create an irrebutable presumption that bias was present. Such error amounted to misconduct thereby enabling the Court to interfere.

Learned Counsel then proceeded to deal with the evidence adduced before the learned Arbitrator.

It was also submitted for Salcra that the award should be remitted for the consideration as the learned Arbitrator failed to consider a point raised in the submission. i.e. the breach of condition 10 (b) of the contract between Salcra and the respondents. But I must hasten to add here that such a point is not a ground in the application before me. I do not think therefore that I should consider this point as an issue by itself.

In resisting the application learned Counsel for the respondents submitted as follows:

(a) there is no error on the face of the Award No. 2 which justifies an order to remit the said award. No extrinsic evidence should be looked at as nothing was incorporated into the said award;
(b) it is not within the jurisdiction of the Court to set aside the award of the learned Arbitrator solely on the basis of any error in fact or in law on the part of the learned Arbitrator since the learned Arbitrator was the sole judge of fact and law. Further, as to what weight and inference to be placed on the evidence adduced, it was for the learned Arbitrator to consider; and
(c) that Salcra should have applied for a special case to be stated under s. 22 of the Arbitration Act 1952 if it so wished to set aside the award on the grounds as given.

It is not in dispute that in considering this applications s. 23 and 24 of the Arbitration Act 1952 are relied upon. The relevant provisions read as follows:

Section 23 (1): In all cases of reference to arbitration, the High Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.

(2): Where an award is remitted, the rabitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.

Section 24 (1): ...

(2): Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

(3): ...

There are ample authorities both local and foreign which provide the scope of the relevant provisions quoted above. Some of the grounds

upon which an award may be remitted to the arbitrator are:

1. Where there has been an admitted mistake and the parties or one of them or the arbitrator himself asks for remission;
2. Where additional evidence is discovered after the award has been made but which could not with reasonable diligence have been discovered earlier;
3. Where there has been misconduct on the part of the arbitrator;
4. Where the arbitrator has made an award in excess of jurisdiction;
5. Where there are obvious defects in the award; or
6. Where there exist procedural error which could lead to injustice.

But it is to be noted that these grounds should not be taken as exhaustive but merely as guides in the exercise of discretion by the Courts. (See: **Russel on Arbitration** 20th Edn. pp. 395 - 396).

As for the setting aside of an award some of the grounds may be summarised as follows:

1. where the arbitrator has misconducted himself or the proceedings;
2. where the arbitration or the award has been improperly procured;
3. Where the award was in excess of jurisdiction: or
4. where there are obvious defects in the award.

Again the power to set aside is discretionary.

In the case of *Ong Guan Teck & Ors. v. Hijjas* [1982] I MLJ 105 his Lordship Hashim Yeop A. Sani J. (as he then was) said this at page 106H:

> As referred to earlier in the judgment s. 23 of the Arbitration Act, 1952 seems to confer a wide discretion for the Court to remit an award. However, the power of the Court to set aside an award is not unlimited and s. 24 (2) of the Act provides that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award had been improperly procured. The language of s. 24 (2) would seem to be rather narrow and limited. In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

In *Ganda Edible Oils Sdn. Bhd. v. Transgrain B.V.* [1988] 1 MLJ 428 at page 431D (left) this is what his Lordship Syed Agil Barakbah SCJ said:

> A distinction should be drawn between a case where a dispute is referred to an arbitrator in which a question of law becomes material from the case in which a specific question of law has been referred to him. The position is that in the former case the Court can interfere if and when an error appears on the face of the award but in the latter no such interference is possible upon the ground that the decision on the question of law is an erroneous one ...

Bearing in mind therefore the principles of law as outlined above and having considered the contentions of the parties I would deal first with the issue raised on Award No. 2.

Learned Counsel for Salcra submitted that there is an error on the award No. 2 while learned Counsel for the respondents argued otherwise. Now for this Court in this instant case the guiding principle should be that the exercise of power to remit is discretionary.

Having perused Award No. 2 I do not think there is any apparent error on the face of the award. However, reference to extrinsic evidence is permissible if such evidence has been incorporated in the award. But this mode is applicable in an application to set aside an award. (See: *Belsfield Court Construction Co. Ltd. v. Pywell* [1970] 1 All ER 453). In the instant case however Salcra is only seeking for an order of remission. But I am of the view that the same principle should be applicable where only an order for remission is applied. After all 'the question whether in any particular case the award will be remitted or set aside depends on the circumstances. Where there has been an error of law on the face of the award, remission is frequently granted.': (**Halsbury's Laws of England,** Vol. 2, 4th Edn. Paragraph 617). And on perusal of the Award No. 2 in this case there is no doubt that the learned Arbitrator did make reference to the points of defence not only by way of elaboration or itemisation but also as a basis for making the award No. 2. In other words, the award No. 2 "can really only be understood by reference" to the points of defence. (See: *Belsfield Court Construction Co. Ltd. v. Pywell [Supra]).* I rule therefore that the points of defence should be taken as having been incorporated in the award No. 2.

Thus, after a close scrutiny of the points of defence I am of the view that in making the award No. 2 the learned Arbitrator failed to

consider paragraph 7 thereof. No doubt paragraph 4 appears to be an admission on the sum due to the respondents but such admission should have been considered together with paragraph 7. A finding has also to be made whether the retention sum or the previous payments have already included the sum payable under paragraph 4 of the points of defence. If so then it is obvious that the respondents should not paid with the sum as awarded. I find therefore that in making award No. 2 the learned Arbitrator misconstrued the effect of the admission in the points of defence and that, in my opinion, is an error of law which justifies the remission of the award No. 2 to him for reconsideration.

In the event that I am wrong in the foregoing conclusion, I am also of the view that in the exercise of my supervisory discretion the award No. 2 should be remitted as justice cannot otherwise be done. I hold the view after hearing the arguments of learned Counsel for the parties. I note that learned Counsel for the respondent did not dispute the allegation that the RM14,420 has been taken into account in the retention sum. Thus, if that is the case then I do not think it is just for Salcra to be made to pay twice for the same services rendered.

Accordingly, I order that award No. 2 be remitted for the reconsideration of the learned Arbitrator pursuant to s. 23 of the Arbitration Act 1952.

I will now deal with the second limb of the application of Salcra i.e. to set aside the award of the learned Arbitrator.

Briefly Salcra's contention is on the ground of misconduct on the part of the learned Arbitrator by reason of the error in law and/or fact in making the award. In effect therefore Salcra is asking the Court to review the evidence adduced during the arbitration hearing and to consider if the findings of law and/or fact of the learned Arbitrator are supported by the evidence adduced. But the grounds submitted as being the reasons to set aside the award appear to me to be confined to the dissatisfaction particularly on award Nos. 3, 4 and 5. Further, it is on the findings of fact of the learned Arbitrator which Salcra is particularly unhappy about.

The first issue to consider therefore is the jurisdiction of the Court on the matters raised in the second limb of the application of Salcra. I have earlier on in this judgment outlined some of the grounds upon which the Courts may set aside awards of arbitrators. But they are not intended to be exhaustive. Further, in **Halsbury's Laws of England,** Vol. 2, 4th Edn., Paragraph 623 it states:

> An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
>
> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking a question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.
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> But the Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face va1ue.

In the case of *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210 his Lordship Raja Azlan Shah J (as he then was) said this at page 211 A - B (left):

> It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the Court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible

upon the ground that the decision upon the question of law is an erroneous one...

In the present case I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. The Court can therefore review the award if and when there is error apparent on the face of the award.

Further down when dealing with the point on 'error of law' his Lordship said this:

Let me state here that this is not a re-hearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, **I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood.** (emphasis is mine).

Similarly in this instant case it is more on the findings of fact and only to a certain degree is there a question of law involved, i.e. whether there is an independent contract separate from the main contract. But to come to a finding of law on such an issue the facts have to be ascertained. And in this case the learned Arbitrator did so. Meanwhile, whether or not he drew the wrong inferences of fact from the evidence 'itself is not sufficient as a ground to warrant setting aside' the award. Anyway, basically the contention of the learned Counsel for Salcra is that the transportation of the seedlings should be taken as an independent contract and therefore the rate prescribed in the main contract between the parties should not be applied. The main thrust of his argument is the absence of the variation order which should be issued if the transportation were to form part and parcel of the main contract. But as the award stands it is difficult to pin-point any error in the findings as the award is an 'unreasoned award' as learned Counsel for Salcra put it and which was agreed by the parties beforehand. I do not think it is justified for Salcra to now come before this Court to say that the findings were erroneous unless of course it can clearly show that on the face of the award there is an error of law inclusive of reference to extrinsic evidence if it has been incorporated in the award. I have no hesitation to say that Salcra has not come near in satisfying me on that ground.

Nevertheless I have also taken the liberty to peruse the notes of proceeding of the arbitration hearing and in my view the learned Arbitrator must have decided after hearing and considering the evidence of the witnesses. As such I do not think it is within the jurisdiction of this Court to reconsider those findings in which the learned Arbitrator should be taken as the sole judge. (See: *Heuven and Kesterton Ltd. v. Sven Widaeus A/B* [1958] 1 All ER 420; *Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.* [1962] 2 All ER 53: *Hodgkinson v. Fernie* 140 E.R. 1712).

For the same foregoing reason I do not find any merit in the grounds or on the alleged breach of condition 10 (b) of the main contract which were submitted in support of the second limb of the application. For Salcra to say that it was a clerical error in the main contract whereby the transportation rate was stated to be 0.40 sen per seedling per mile when there was no ambiguity or that no correction whatsoever was done until the claim was made, appears to me to be not appropriate in the circumstances. Even the evidence adduced showed conflicting versions which therefore entitled the learned Arbitrator to make his own inferences or conclusions being the sole judge of fact. (See: *G.K.N. Centrax Gears Ltd. v. Matbro Ltd.* [1976] 2 Lloyd's Report 555).

Accordingly I am not therefore satisfied that Salcra's grounds for the second limb of the application have passed the test necessary before any act or finding of the learned Arbitrator can be considered as amounting to a misconduct. As such I dismissed the second limb of the application.

Conclusions:

For OM/KG. No. 8 of 1993 the award is hereby ordered to be remitted to the learned Arbitrator for his reconsideration on the issue of the pre-award interest only.

As for OM/KG. No. 9 of 1993 only award No. 2 is hereby ordered to be remitted to the learned Arbitrator for his reconsideration.

The second limb of the application is hereby dismissed.